77-49

No.

Supreme Court, U. S.
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In The Supreme Court of The United States

June Term, 1977

RONALD HOLM

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD HOLM prays that a Writ of Certiorari issue to review the Opinion of the United States Court to Appeals for the Ninth Circuit entered in the above case on March 25, 1977.

CITATION TO OPINION BELOW

The Opinion of the Court of Appeals of March 25, 1977 is not reported at this date but is set forth verbatim in Appendix "A" of this Petition.

JURISDICTION

On March 25, 1977, the Court of Appeals for the Ninth Circuit entered judgment affirming the criminal conviction of Petitioner of conspiracy to possess amphetamines with intent to distribute, a violation of 21 U.S.C. §841(a)(1). The jurisdiction of this Court is invoked under Title 28, U.S.C. §1254(1), and Rules 19(b) and 22(2) of the Rules Of The Supreme Court.

QUESTIONS PRESENTED

Whether Petitioner's Sixth Amendment rights were violated by his denial of right to speedy trial.

Whether the trial Court had jurisdiction to try the Petitioner on an indictment which had been superseded by the Grand Jury.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment Six of the Constitution of the United States:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense

Amendment Five of the Constitution of the United States:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On May 28, 1975, the Grand Jury for the Southern District of California returned a one count indictment (Criminal Case No. 75-1042), charging the Petitioner and others with one count of conspiracy with intent to possess and distribute amphetamines in violation of Title 21, United States Code, Section 841(a)(1) and Section 846.

The overt acts were alleged as follows:

(1) On or about January 3, 1974,

defendant, Eugene Pavey, rented a vehicle in the Southern District of California.
(2) On or about January 4, 1974, unindicted co-conspirator, James Anderson, received approximately 100,000 amphetamine tablets from defendant, Ronald Holm, in the Southern District of California.
(3) On or about January 13, 1974, defendant, Wanda Maria Suza Brito, rented a hotel room in the Southern District of California.
(4) On or about January 16, 1974, unindicted co-conspirator, James Anderson, possessed approximately 300,000 amphetamine tablets in the Southern District of California.
(5) On or about January 16, 1974, defendants, Ronald Holm and Joseph Jackson McGill, met with unindicted co-conspirator, James Anderson, in the Southern District of California."

On September 10, 1975 the Grand Jury returned an indictment (Criminal Case No. 75-1580), superseding the indictment in Case No. 75-1042. This new indictment charged Petitioner and others with a conspiracy to possess and distribute amphetamines as per the May 28, 1975 superseded indictment.

In this September 10, 1975 indictment, Petitioner again was charged with only one count. The same overt acts were alleged as in the indictment of May 28, 1975.

On December 10, 1975, the Grand Jury returned a three count indictment (Criminal Case No. 75-2024), superseding

indictment Nos. 75-1042 and 75-1580. This indicted Petitioner and others with conspiracy to possess and distribute amphetamines as in the earlier two indictments.

Count one of the said indictment alleged an overt act as follows:

> (1) Sometime in September or October, 1973, defendants, Ronald Holm, Joseph Jackson McGill and Donald Garrett, met in the Southern District of California.

In October, 1975, Petitioner joined in a motion filed by defendant, Joseph Jackson McGill to dismiss the indictment in Criminal Case No. 75-1580 on the grounds that the government failed to bring defendant to a speedy prosecution. No new evidence had been obtained against Petitioner between 12 and 13 months prior to requesting the Grand Jury to return the indictment.

Throughout the entire proceedings Petitioner continually objected to any continuance of the trial date.

The United States Attorney gave as the primary reason that the case was not prosecuted in its early stages was that when the investigative agents brought the case to the United States Attorney, the United States Attorney felt that the matter did not warrant investigation. The Assistant United States Attorney felt that there was no one underlying reason why the Petitioner was not indicted at an earlier date.

On November 24, 1975, the trial court denied Petitioner's motion to dismiss the indictment for lack of speedy prosecution, but granted his motion for severance and set Petitioner's trial date for January 16, 1976.

On January 16, 1976, despite the fact that the indictment in Criminal Case No. 75-1580 had been superseded by the indictment filed on December 10, 1975 in Criminal Case No. 75-2024, defendant was tried on the superseded indictment.

All of the witnesses called for the government which implicated Petitioner were conspirators. The Petitioner did not testify in his own behalf.

On January 21, 1976, the Jury, having deliberated for only 1 hour and 25 minutes, found the Petitioner guilty.

On February 23, 1976, Petitioner duly filed a Notice of Appeal. The Appeal was argued before the United States Court of Appeal for the Ninth Circuit and on March 25, 1977, the Court of Appeals affirmed the decision of the District Court. See Appendix "A", infra.

On May 13, 1977, the Court of Appeal entered its Order denying Petitioner's Request for Rehearing. See Appendix "B" infra. This Petition follows:

STATEMENT OF FACTS

In December of 1973, James Anderson, an unindicted co-conspirator, testified that he and defendant, Eugene Pavey, came

from Fort Lauderdale, Florida to Chula Vista, California in order to purchase a quantity of drugs. When he and Pavey arrived in California, Pavey rented a motel room and a car and then Pavey took him and introduced him to Petitioner, Ronald Holm, at Holm's house in Chula Vista, California. At the meeting was defendant, Donald Garrett.

Anderson testified that he had come out to California to purchase some barbituates, and Pavey had come to California to purchase some amphetamines. He, Anderson, was to become a carrier for defendant, Pavey.

Anderson testified he made a second trip to San Diego, California on January 13, 1974, to purchase more pills. At that time he did not bring any money with him but was to meet defendant, Wanda Brito, at the San Diego Airport, who was to deliver the money to him. Anderson met Wanda Brito at the San Diego Airport and checked into the Royal Inn with her where they proceeded to count the money.

He testified that on or about January 16, 1974, he received 300,000 pills from Petitioner, Ronald Holm.

When Anderson attempted to make his return flight he was apprehended by Agent McCravey, a special agent with the United States Department of Justice, Drug Enforcement Administration. McCravey took Anderson to jail and the following morning had him released and took him to the D.E.A. Office in San Diego, California. There Agent McCravey asked Anderson if he would cooperate and help with the case

and Anderson said he would. When Agent McCravey fouud a phone number that Anderson had in his possession, which eventually turned out to be the telephone number of the Petitioner, Ronald Holm, Agent McCravey asked Anderson to make a telephone call to this number, which Anderson did. This telephone conversation was recorded with the consent of Anderson only and not with the consent of the Petitioner, Ronald Holm. During this conversation Agent McCravey discovered that witness Anderson had been lying and agreed to take witness Anderson's name off of a statement Anderson had made in order to prevent Anderson from committing perjury, if Anderson would come back the next day and give McCravey the true story. However, Anderson left for Miami, Florida and did not go back to see Agent McCravey.

After Anderson returned to Florida, he was once again arrested by a D.E.A. Agent. Charges were subsequently filed against Anderson for possession of amphetamines and he was arraigned on those charges. Those charges were eventually dropped and the government promised him immunity in return for his testimony against Holm and others.

On February 19, 1974, Anderson gave another statement to the D.E.A. Agents. During this statement and interview Anderson was not sure of his identification of Petitioner, Ronald Holm.

However, it was based on this statement that charges were brought against the Petitioner, Ronald Holm and his arrest in June, 1975.

During the time Anderson was in San Diego, California, he had been taking drugs. He admitted that he had been literally "stoned" and "loaded" the entire time he was in San Diego. He further admitted that the taking of these drugs affected his ability to recall the events and that it was not until March, 1975 when he appeared before the Grand Jury in San Diego, approximately 14 months after the alleged dealings with the Petitioner, Ronald Holm, that he could clearly recall the events of January, 1974.

REASONS FOR GRANTING THE WRIT

The primary issue involved in this case is a matter of first impressions as far as can be determinated by Petitioner. That issue, simply stated is:

> When a Federal Grand Jury returns an indictment against a defendant which supersedes a former indictment, does the court have any jurisdiction to try the defendant on the superseded indictment?

The Opinion of the Ninth Circuit avoids the contention raised by Petitioner that the matter is jurisdictional and rests its decision on the fact that Petitioner failed to show any significant prejudice.

Petitioner contends that the failure to be tried on an existing indictment by a Grand Jury is prejudicial and violates his fundamental Constitutional rights.

The Ninth Circuit cites Thompson v. United States, 202 F.401, 404 (9th Cir. 1913) for the proposition that the Government may have two indictments outstanding against an accused at the same time. However, neither indictment in the Thompson case was superseded by the other by action of the Grand Jury and therefore required an order of the Court to dismiss them.

In the present case, the indictments on their face show that they were "superseded" by the subsequent action of the Grand Jury.

This having occurred, the court had no jurisdiction to hear the case and it was error to bring the Petitioner to trial on an indictment that no longer existed.

The word "supersede" by definition menas to "replace...to make void, useless or unnecessary by superior power..., to set aside; to annul; to repeal..." 83 C.J.S. p. 888.

If this was not the intent of the Grand Jury and the Office of the United States Attorney, then they should have used the words "subsequent", "second", or "third" or not even referred to the prior indictments.

The cases all hold that the use of the word "supersede" must be given its plain and ordinary meaning.

In People ex rel. Traino v. Slattery, Warden (1942), 38 N.Y.S.2d 553, the court stated that the word supersede must be taken in the ordinary, accepted meaning.

In United States v. Mulligen (1975), 520 F.2d 1327, the Court held that when the Grand Jury indicted the defendant, it "superseded" the complaint and therefore eliminated the necessity of a preliminary hearing on the complaint.

In United States v. Consolidated Land (1961), 291 F.2d 563, 573, the court stated that the defendant, in 1955,

> "was arrested and arraigned upon an indictment making the very charges which were subsequently incorporated in the 1957 indictment 'superseded' a 1955 indictment...."

And even though the following case is not one in criminal law, the court addresses itself to the meaning of the word "supersede":

> "He contends that in any event the two contracts must be regarded as one---because of an endorsement upon the last contract that it 'supersedes prior contract.' But the word 'supersede' must be given its ordinary meaning...to make void, inefficacious or useless by superior power....How then can two instruments be regarded as the same contract, if one is superseded by the other? The answer is that each of the instruments constituted a separate contract, and when the new one came into life the old one went out of existence."

Taylor v. N.Y. Telephone, 160 N.Y.S. 865, 866, 97 Misc. 160, 162 (1916).

Since the indictment on which the defendant Holm was tried had been superseded by a subsequent indictment, it

follows that the court had no jurisdiction to try the defendant on that indictment. Therefore, his conviction should be reversed.

II.

The conviction of Holm should be set aside since he was denied his right to a speedy trial.

Petitioner Holm's right to a speedy trial attached in May, 1975, when he was first indicted. Even though superseding indictments were later brought, they did not alter the time in which his right to a speedy trial had attached. All three indictments arose out of the same set of circumstances.

The court in United States v. Bergdoll (1976), 412 F.Supp. 1308, 1320, stated that if it were held otherwise "...the government by manipulating the Grand Jury process could defeat defendant's speedy trial rights by the mere charade of new indictments."

In Bergdoll, supra, the defendant was first indicted in July, 1975 and then indicted again in November of that year. The Court held that "...the speedy trial rights of the defendant attached in July, 1975, and the effective date was not affected by the superseding indictments of November." 412 F.Supp. at 1320.

Thus, in the instant case, Petitioner's right to a speedy trial attached in May, 1975 when he was first indicted. Since he was not brought to trial until January, 16, 1976, he was denied the right to a speedy trial which is guaranteed under

the Sixth Amendment of the Constitution of the United States.

Lately, this Court has applied a balancing test in order to determine whether or not an accused's right to a speedy trial has been violated. (Barker v. Wingo (1972) 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed.2d 101). Here, the Court looks to the length of the delay, the reasons for the delay, the assertion of the right to a speedy trial, and prejudice to the defendant.

There was no reason given for the delay in bringing Holm to trial. The delay was approximately eight months, and Holm did assert his right to a speedy trial during the pretrial procedures.

It has also been held that:

> "A motion made by...a defendant for a dismissal of the complaint on the ground that there had been unnecessary delay in presenting the charge to a Grand Jury, would be the equivalent of a demand for a speedy trial by a defendant who had already been indicted." United States v. Fassoulis (1959), 179 F.Supp. 645, 647.

The last balancing factor is that of prejudice to the defendant.

Even if it can be said that there was no prejudice, since these factors should be weighed and balanced, what is left to balance if the government cannot show any reasons or need for the delay?

"Prejudice, however, is only one

of the balancing factors to be considered and its absence does not necessitate a finding that defendant's right has not been violated." United States v. Dowl (1975), 394 F.Supp. 1250, 1254.

According to the Appendix Rule of the United States District Court for the Southern District of California, under the Plan for Achieving Prompt Disposition of Criminal Cases, passed pursuant to the request of Rule 50(b) of the Federal Rules of Criminal Procedure, a defendant must be brought to trial within 120 days after arraignment.

Petitioner was not brought to trial within 120 days.

However, the Appendix does state that time limits will be extended in certain cases. None of the reasons listed are applicable to the instant case. Even the "catch all" reason under 3.h does not apply. It provides that "other periods of delay occasioned by exceptional circumstances will be reason to extend the time limit.

In Bergdoll, supra, there were 26 defendants and many law enforcement agencies involved. It was held that these were exceptional circumstances, warranting an extension of the time limit within which the defendant should have been brought to trial.

In the instant case, however, there were no exceptional circumstances. It is a case arising from one set of facts and only a few defendants. Therefore,

this exception would not apply to the Petitioner.

In the case of United State v. Rodriquez (1974), 497 F.2d 172, defendants were convicted for possession of marijuana with intent to distribute. The defendants contended on appeal that the court erred in not dismissing the indictment since the time between arraignment and trial was longer than that presceibed by the Plan for the Southern District of Texas, adopted pursaunt to Rule 50(b) of the Federal Rules of Criminal Procedure.

The court held as follows:

"...Implicit in adoption of the rule is that this public interest is not adequately safeguarded by the protections accorded defendant through the speedy trial clause of the Sixth Amendment and Rule 48(b)...The Plan for the Southern District of Texas, as do all those plans in this circuit, seeks to meet this mandate to consider the added dimension of public concern by creating new responsibilities, setting up new procedures and establishing specific maximum time limits for the occurrences of each step in the criminal process.

In the instant case the district judge stated that he considered the defendants' failure to demand trial and their failure to show prejudice. These considerations are, of course, part of the balancing test demanded by Barker v. Wingo (citation omitted) to determine whether the defendants' Constitutional rights to a speedy

trial was violated. However, questions of compliance with 50(b) plans in this circuit demand the use of a broader calculus. Such considerations are only a beginning in determining whether non-compliance with the Plan's time limits requires dismissal of an indictment. Their relationship to the public interest which the Plan was intended to emphasize is, at most, attenuated. The Plan itself provides that lack of prejudice 'shall not justify non-compliance'. It likewise clearly stated that the Plan is 'applicable to all criminal actions without any necessity for demand by the defendant.' The uniqueness of these plans is that they place an affirmative duty on the government to bring the accused to trial. In judging plan compliance, consideration of lack of prejudice to the defendant or demand for trial by the defendant could serve to transpose a part of this burden to the accused. It is the duty of the prosecutor and the court to make these plans work. Therefore, on this appeal we limit our test of the validity of the denial of the defendants' motion to dismiss to the basis set out by the court below as the sole cause of the delay--the court's extremely crowded docket."
497 F.2d at 175.

Therefore, the court felt that even without a showing of prejudice to the defendant, the case should be dismissed unless there was a valid reason for the delay.

The court went on to state that:

"The Plan does not require dismissal for delays which are necessary, i.e., beyond the control of the court or prosecution....On the other hand, delays caused by prosecutorial or judicial inefficiency or neglect, i.e., correctible faults, are within the aim of the Plan."
497 F.2d at 176.

The court then held that since the delay was due to an exceptionally crowded docket they would not require dismissal. It was beyond the control of the court or the prosecution.

In the instant case, however, there were no necessary delays. The delays were not caused by Petitioner but were caused by prosecutorial or judicial inefficiency or neglect.

And "...strict sensitivity to the requirements of these plans must be the standard if they are to achieve the high purpose for which they are intended."
497 F.2d at 176.

CONCLUSION

The the foregoing reasons, this Petition for Writ of Certiorari should be granted to review the decision of the United States Court of Appeals for the Ninth Circuit in this case and to decide the questions presented herein.

Respectfully submitted,

Dated: 6/9/77

MORRIS SANKARY
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Petition were mailed, postage prepaid, to the Office of the Solicitor General of the United States this 10th day of June, 1977.

MORRIS SANKARY

APPENDIX A

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America,

Plaintiff-Appellee,

vs.

Ronald Holm,

Defendant-Appellant.

No. 76- OPINION

[March 25, 1977]

Appeal from the United States District Court
for the Southern District of California

Before: ELY and WALLACE, Circuit Judges, and WILLIAMS (Honorable Spencer Williams, Northern District of California, sitting by designation), District Judge.

PER CURIAM:

In May of 1975 the grand jury for the Southern District of California charged defendant Holm and others with conspiracy to possess amphetamines with intent to distribute them, in violation of 21 U.S.C. §§841(a)(1) and 846. The indictment was superseded in November, 1975, by a new indictment which named two additional

defendants and added two additional counts not pertaining to Holm.

Holm filed a motion alleging that the delay in bringing the indictment violated his fifth amendment right to a fair trial and the District Court denied the motion. However, the motion was granted as to a co-defendant who had filed an affidavit alleging death of one of his principal defense witnesses. Subsequently, a third indictment labled "Superseding Indictment" was returned on December 11, 1975, realleging the conspiracy involving Holm. For some reason not explained in the record, Holm was tried on the November, rather than on the December indictment. In January, 1976, he was found guilty after a jury trial.

I.

Holm first attacks his conviction on the ground that he could not validly be tried on the superseded November indictment. His argument, based primarily on the dictionary definition of the word "superseded", is entirely formalistic. It is undisputed that the Government may have two indictments outstanding against an accused at the same time. Thompson v. United States, 202 F.401, 404 (9th Cir. 1913). We do not accept the argument that the use of the word "superseded" in the December indictment means that the trial of Holm on the November indictment deprived his of his right to be indicted by a grand jury. Perhaps if we could discern some significant prejudice to Holm from the procedure that was followed, our holding would be different. Here, however, we cannot perceive any such

prejudice.

II.

Holm's claim that the Government's delay in bringing the indictment violated his fifth amendment right to a fair trial is foreclosed by his failure to present evidence of actual prejudice. See United States v. Coltrane, No. 75-1585, slip opinion p. 260, ____ F.2d ____ (9th Cir. 1977). While the absence of prejudice is not totally dispositive of Holm's "speedy trial" claim under the Sixth Amendment, we conclude that the district judge was correct in refusing to dismiss the indictment. A weighting of the factors suggested in Barker v. Wingo, 407 U.S. 514, 92 S.Ct. 2182, 33 L.Ed. 101 (1972) comes out heavily in favor of the Government.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

United States of America, Plaintiff-Appellee, vs. Ronald Holm Defendant-Appellant.	Filed May 13, 1977 U.S. Court of Appeals

No. 76-1537 ORDER

Before: ELY and WALLACE, Circuit Judges, and WILLIAMS (Honorable Spencer Williams, Northern District of California, sitting by designation), District Judge.

The Petition for Rehearing denied.